IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 26, 2008 Session

LEORY WILLIAMS v. COLUMBIA HOUSING AUTHORITY

Direct Appeal from the Chancery Court for Maury County
No. 05-288 Stella L. Hargrove, Chancellor

No. M2007-01379-COA-R3-CV - Filed September 30, 2008

This appeal involves summary judgment on an employee's common law and statutory retaliatory discharge claims. The trial court granted summary judgment in favor of the employer, finding that the employee had not established a prima facie case for either claim. The employee appeals, and we affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, P.J.,W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Leroy Williams, Murfreesboro, *pro se*

Wesley Mack Bryant, Columbia, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

In December of 1999, the Columbia Housing Authority ("CHA"or "Appellee") hired Leroy Williams ("Appellant") as its executive director. CHA is a public housing authority in Columbia, Tennessee, authorized by the U.S. Department of Housing and Urban Development ("HUD") to furnish government housing to those who qualify. As CHA's executive director, Mr. Williams was responsible for overseeing the day to day operations, "including implementing the policies and procedures of the [CHA] Board of Directors[.]" Mr. Williams and CHA did not have a written employment contract.

In August of 2002, HUD performed an on-site "coordinated management/monitoring review" of CHA. HUD performed this review "based on factors of a risk analysis, including new Executive Director, tenant/hot-line complaints, [and] past practices that caused near-troubled status." A letter from HUD accompanying the report read, in relevant part:

> The report includes findings and corrective actions required, observations and recommendations for improvement and general areas of concern. The report also . . . reflects an overall average performance rating. There were several areas of unsatisfactory operation as noted in the report. However, there have been areas of great improvement and we commend the agency for its progress in correcting certain deficiencies listed in the previous review report of 1995.

The report's "executive summary" indicated that "[i]n recent years, there have been several Executive Directors appointed (Mr. Leroy Williams currently holds the position). CHA was designated Troubled under the Public Housing Management Assessment Program (PHMAP). . . ." Of the 26 problems documented in the previous 1995 report, 9 of those were repeat problems in the 2002 report. The executive summary explained:

> [T]here remain many problems that need final resolution. There are several '**REPEAT**' findings. Repeated findings are especially serious because it is evidence that deficiencies were never corrected though certified as such to the HUD office for clearance of a prior finding - the Agency made false certifications. Because of the repeat nature of some findings, clearance will only be granted following on-site verification of the corrective action.

The report concluded that "management performance of the [CHA] has greatly improved under the leadership of its current Board, Executive Director and staff. . . . The CHA appears to be operating at the standard performer level."

HUD conducted a follow-up review of CHA on April 22 through 24, 2003. (Exhibit 19). The follow-up report indicated:

> There have been some very significant improvements in the operations of [CHA]. There also remains much work to be done, especially in the area of vacant unit turnaround. . . . Executive Director Williams' comments throughout this on-site session included reminders that CHA was in much worse condition when he began his tenure three years ago. While the HUD office certainly agrees with his assessment, it is also believed that three years is sufficient time to have resolved many of the on-going and recurring problems.

The follow-up report also indicated that "the overall [Financial Assessment] score for 2002 is 19.88, which is less than two points from failing and being designated as a financially troubled [public housing agency]." Of the previous 9 findings/problem areas, 3 still remained open after the follow-up review.

In July of 2004, HUD's Memphis Hub conducted a "public housing assessment system independent assessment & confirmatory review." This review indicated that CHA had received a failing Financial Assessment score as of December 31, 2003, and thus, this July 2004 review was necessary. This report indicated several "areas requiring improvement," including the area of vacant unit turn around, which was a repeat finding/problem during the 2002 review.

CHA's Board unanimously decided to terminate Mr. Williams' employment effective August 12, 2004.

On March 6, 2005, Mr. Williams filed suit against CHA, alleging both statutory and common law claims of retaliatory discharge. Mr. Williams painted a different picture of the events leading up to his termination. He contended that the Board fired him because he raised issues relating to improper practices of Board members. Specifically, Mr. Williams alleged violations by the Board of its personnel policy; violations of its travel expenses policy; the misuse of CHA employees and equipment by certain Board members for personal business; and an agreement between CHA and the City of Columbia, in which CHA "has paid the city money to clean the streets, however, despite the fact that the Plaintiff continued to pay this bill, the [c]ity has done nothing as consideration for these payments." As to the last contention, Mr. Williams alleged that "[s]ince [he] addressed his concerns the Board of Directors was concerned that the Plaintiff would expose this agreement."

CHA filed an answer, and on April 19, 2007, filed a motion for summary judgment. CHA contended in its motion that it terminated Mr. Williams' employment due to "his unwillingness to address HUD concerns," and not in retaliation for any other actions/inactions on Mr. Williams' part.

On May 22, 2007, the trial court granted CHA's motion for summary judgment. Without further elaboration, the court found that Mr. Williams failed to establish a prima facie case for his claims of common law retaliatory discharge and statutory retaliatory discharge, and thus CHA was entitled to judgment as a matter of law.

CHA then filed a motion for discretionary costs and a motion for sanctions/attorney's fees. CHA sought sanctions against Mr. Williams, contending that he instituted his cause of action for an improper purpose,[1] "including but not limited to harassment and/or to cause needless increase in costs to [CHA]."

On June 21, 2007, Mr. Williams filed his notice of appeal. Thereafter, on August 17, 2007, Mr. Williams attempted to supplement the record. CHA filed a motion opposing such an amendment to the record, as such documents were not before the trial court when it ruled on the motion for summary judgment.

On November 27, 2007, the trial court denied both CHA's motion seeking sanctions/attorney's fees and Mr. Williams' motion to supplement the record. On December 21, 2007, CHA filed its notice of appeal concerning the trial court's denial of its motion for sanctions/attorney's fees.

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[1] Tenn. Code Ann. § 50-1-304(f)(2) provides:

> If any employee files a cause of action for retaliatory discharge for any improper purpose, such as to harass or to cause needless increase in costs to the employer, the court, upon motion or upon its own initiative, shall impose upon the employee an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred, including reasonable attorney's fee.

II. ISSUES PRESENTED

Mr. Williams[2] raises three issues for our review. The only issue we perceive is whether the trial court erred in granting summary judgment.[3] Additionally, CHA argues that the trial court erred in denying its motion for sanctions/attorney's fees.

III. STANDARD OF REVIEW

We review the trial court's decision concerning summary judgment *de novo* with no presumption of correctness. ***Abbott v. Blount County***, 207 S.W.3d 732, 735 (Tenn. 2006) (citing *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002)). "Summary judgment is appropriate only when the moving party has shown that there is no genuine issue of material fact and that the party is entitled to summary judgment as a matter of law." ***Id.*** (citing *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002)). Summary judgment proceedings should not be used "as a substitute for trial of disputed factual issues." ***Jones v. Home Indem. Ins. Co.***, 651 S.W.2d 213, 214 (Tenn. 1983). If there is any doubt as to whether a genuine issue of material fact exists, then summary judgment is inappropriate. ***Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville***, 154 S.W.3d 22, 41 (Tenn. 2005) For purposes of summary judgment, we view the evidence in a light most favorable to the non-moving party, draw all reasonable inferences in the non-moving party's favor, ***Abbott***, 207 S.W.3d at 735 (citing *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002)), and disregard all countervailing evidence. ***Byrd v. Hall***, 847 S.W.2d 208, 210–11 (Tenn. 1993).

IV. DISCUSSION

The trial court found that Mr. Williams did not establish his prima facie case for statutory retaliatory discharge and common law retaliatory discharge. We agree.

Generally, an at-will employee may be fired for good cause, bad cause, or no cause at all. ***Collins v. AmSouth Bank***, 241 S.W.3d 879, 884 (Tenn. Ct. App. 2007) ("Tennessee is an employment at-will state."); ***Willard v. Golden Gallon-TN, LLC***, 154 S.W.3d 571, 575 (Tenn. Ct. App. 2004) (citations omitted). Under our common law, however, there is a narrow exception to the

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[2] Mr. Williams' attorney withdrew on October 31, 2007, and Mr. Williams has proceeded *pro se.*

[3] Mr. Williams attempts to raise the following new claim on appeal: "whether the plaintiff was entitled to notices before the CHA Board took adverse action against him that resulted in his termination." The crux of this argument is that the Board did not follow its personnel policy when it fired Mr. Williams. This claim was not raised in the lower court, and thus it is waived. *See* ***Crossley Constr. Corp. v. National Fire Ins. Co. of Hartford***, 237 S.W.3d 652, 656 (Tenn. Ct. App. 2007) ("[W]e will not consider issues, let alone claims, raised for the first time on appeal.").

employment at-will doctrine: an employer is prohibited from terminating an employee when doing so violates a clearly established public policy, which is "evidenced by an unambiguous constitutional, statutory, or regulatory provision." ***Collins***, 241 S.W.3d at 884 (citing *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 717 (Tenn. 1997); *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552, 556 (Tenn. 1988)). For a retaliatory discharge claim under our common law, the employee must prove: (1) the existence of an at-will employment relationship between the employee and the employer; (2) the termination of the at-will employment relationship; (3) the employee was fired for attempting to exercise a statutory or constitutional right, or for any other reason that violates a clear public policy; and (4) the whistleblowing action was a substantial factor in the employer's decision to fire the employee. ***Guy v. Mutual of Omaha Ins. Co.***, 79 S.W.3d 528, 535 (Tenn. 2002).

Similarly, there is a statutory exception to the employment at-will doctrine. The Tennessee Public Protection Act ("TPPA"), commonly known as the "whistleblower statute," provides that "[n]o employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities." Tenn. Code Ann. § 50-1-304(a). The Code defines "illegal activities" as "activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare." Tenn. Code Ann. § 50-1-304(c). To prevail under the TPPA, the plaintiff must establish:(1) his status as an employee of the defendant employer; (2) his refusal to participate in, or remain silent about, illegal activities; (3) his termination; and (4) an exclusive causal relationship between his refusal to participate in or remain silent about illegal activities and his termination. *See* ***Id.***; ***Franklin v. Swift Transp. Co., Inc.***, 210 S.W.3d 521, 528 (Tenn. Ct. App. 2006).

Under the TPPA, the employee must demonstrate that the *sole reason* he was fired was because of his refusal to participate in illegal activities, whereas the employee need only demonstrate that his refusal was a *substantial factor* under the common law. ***Guy v. Mutual of Omaha Ins. Co.***, 79 S.W.3d 528, 537 (Tenn. 2002). However, to proceed under either claim, the employee must prove:

> [M]ore than that their employer violated a law or regulation. They must prove that their efforts to bring to light an illegal or unsafe practice furthered an important public policy interest, rather than simply their personal interest. While they need not report the suspected illegal activities directly to law or regulatory enforcement officials, they must make a report to some entity other than the person or persons who are engaging in the allegedly illegal activities.

Collins v. AmSouth Bank, 241 S.W.3d 879, 885 (Tenn. Ct. App. 2007) (internal citations omitted). As this Court explained in ***Franklin v. Swift Transp. Co., Inc.***, 210 S.W.3d 521, 532 (Tenn. Ct. App. 2006), "[f]inding that any regulatory infraction by an employer, no matter how minor, can support a claim of retaliatory discharge would be a clear extension of the law, well beyond the boundaries of any prior Tennessee decision."

Even if the employee has established a prima facie case, summary judgment is appropriate if the employer can articulate a legitimate, non-discriminatory reason for the termination and the employee is unable to present evidence that the proffered reason given by the employer is pretextual. *See* ***Smith v. Bridgestone/Firestone***, ***Inc.***, 2 S.W.3d 197, 200 (Tenn. Ct. App. 1999) (citations omitted).

Turning back to the present case, we find that Mr. Williams has not established his prima facie case for either claim. It is undisputed that CHA and Mr. Williams had an at-will employment relationship, and that CHA terminated that relationship. As discussed, under the TPPA, employees must show that the *sole* reason they were fired was because of their refusal to participate or remain silent about illegal activities. By Mr. Williams' own admission in his deposition testimony, CHA did not fire him *solely* due to Mr. Williams' refusal to participate in or refusal to remain silent about the alleged illegal activities:

> Q. You're not saying [that your professional] achievements [at CHA] was why you were fired?
> A. I'm saying achievements played a part.
> Q. Okay. Okay.
> A. I'm not saying that's the ultimate rationale for the termination but I believe it played a part.
> Q. How do you believe it played a part in your termination?
> A. As I indicated before, I'm not a [Maury] County [native] - - I established relationships with the City, police department, fire department, CHA employees, and CHA tenants. And I believe my relationship[s] and I believe that my management style was an essential part.
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> . . .
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> Q. Is it your contention that the only reason you were fired was for your refusal to remain silent about these illegal activities?
> A. Let me answer that by saying I think it was a big part.
> Q. But not the only reason?
> A. Not the only reason.

As to both claims, while Mr. Williams summarily stated in his complaint that "the Board of Directors has violated a number of HUD regulations, many of which were designed to protect the public health, safety and welfare," he does not specify which HUD regulations the Board violated. We find it curious that Mr. Williams argues that he was fired because the Board was fearful he would "expose" the cooperation agreement between CHA and the city, when reference to the

agreement appeared in the July 2004 HUD report.[4] But even assuming that Mr. Williams pointed to some illegal activity or activity against public policy that could support a retaliatory claim, nowhere in the record do we find any indication that CHA terminated Mr. Williams based on his failure to personally engage in that activity. Nor do we find anything in the record indicating that Mr. Williams reported this alleged illegal behavior to anyone other than the supposed violators[5] or indicated to the Board that he would not remain silent about the alleged illegal activities.[6] More is needed than simply pointing to some violation of the law on the employer's part. ***Collins v. AmSouth Bank***, 241 S.W.3d 879, 885 (Tenn. Ct. App. 2007). The TTPA's "protection extends to employees who have reasonable cause to believe a law, regulation, or rule has been violated or will be violated, and in good faith report it." ***Mason v. Seaton***, 942 S.W.2d 470, 472 (Tenn. 1997) (citation omitted). We find nothing in the record to indicate that Mr. Williams attempted to "bring to light" any of the alleged illegal practices. *See* ***Collins***, 241 S.W.3d at 885. We need not get into whether Mr. Williams established the causation element, or whether CHA had a legitimate, non-pretextual reason for terminating Mr. Williams, because as just discussed, Mr. Williams has failed to establish all the elements of his prima facie case.

Turning now to CHA's argument concerning attorney's fees under Tenn. Code Ann. § 50-1-304, we agree with the trial court that attorney's fees should not be awarded, as Mr. Williams' cause of action does not rise to the level of frivolous.

V. CONCLUSION

We affirm for the reasons stated herein. Costs of this appeal are taxed to Appellant, Leroy Williams, and his surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J.,

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[4] When asked at the deposition hearing whether Mr. Williams had any evidence (other than the allegation in his complaint) to indicate that the Board was concerned that this agreement would be "exposed," he answered, "other than - - no, I don't."

[5] Mr. Williams argued in his brief that "in 2001, 2002, and 2003, [he] complained to then Chairperson Barbara Dobbins, about [her use] of CHA's employees and equipment during work hours for personal gain." Mr. Williams also points to violations of CHA bylaws, such as the Board conducting business without a quorum, and improper reimbursement of travel expenses. Even assuming that the aforementioned activities constitute "illegal activity" under TTPA or are against public policy, which is "evidenced by an unambiguous constitutional, statutory, or regulatory provision," Mr. Williams did not voice any objection to such activity to anyone other than the Board members in question. Apparently, Mr. Williams did raise issues concerning the cooperation agreement to the Mayor, but he points to no statute or violation of public policy that would preclude a housing authority and a city from entering into such an agreement.

[6] When asked, "Explain to me then how you were being fired for refusing to remain silent about [Board members staying on after their expired term,]" Mr. Williams responded, "Because I was aware of it."